In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 451

A. RICHARD PERKINS, Administrator of the Estate of Sue Garrett Perkins, Deceased,

Petitioner,

vs.

WAUKESHA NATIONAL BANK, Individually, and as Trustee, and EDWARD G. BACON, Individually, as Executor of the Estate of Isabel Hadcock, Deceased, and as Trustee under the Last Will and Testament of Isabel Hadcock, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit

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Of Counsel.

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No.

A. RONALD PERKINS, Administrator of the Estate of Sue Garrett Perkins, Deceased,
Petitioner

vs.

WAUKESHA NATIONAL BANK, Individually, and as Trustee, and EDWARD G. BACH, Individually, as Executor of the Estate of Isabel Hadcock, Deceased, and as Trustee under the Last Will and Testament of Isabel Hadcock, Deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Seventh Circuit

Petitioner A. Ronald Perkins prays that the writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit entered on its

docket No. 13,210 on May 26, 1961 affirming a decision of the United States District Court for the Eastern District of Wisconsin.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court filed September 7, 1960 is unreported. That opinion and the court's findings of fact and conclusions of law are reproduced in the record (App. 28-48).[1] The opinion of the Court of Appeals is reported at 290 F. 2d 912 and is reproduced in Appendix A appended to this petition.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1961; a timely petition for rehearing filed on June 10, 1961 was denied on June 29, 1961. Jurisdiction of this Court is invoked under U. S. Code, Title 28, Sec. 1254(1).

STATUTES INVOLVED

United States Code, Title 28, Section 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

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[1]References (App. .....) in this petition refer to pages of the Appendix to Appellants' Brief included as a part of the record.
[2]References to the opinion are designated (App. A).

The Constitution of Wisconsin (adopted March 13, 1848), Article 14:

> "Section 13. Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

The Wisconsin statutes, Chapter 363 Laws of 1935, amended Section 320.01:

> "Executors, administrators, guardians, and trustees may invest the funds of their trusts in accordance with the provisions pertaining to investments contained in the instrument under which they are acting, or in the absence of any such provisions, then in securities of the following classes:
>
> (1) In bonds, notes or other evidences of indebtedness of the United States • • •
>
> • • • • • • •
>
> (11) Obligations secured, whether alone or in combination with other obligations on a parity therewith, by real estate mortgages • • • which • • • are a first lien on improved real property situated in this state or adjoining states, the amount of which obligations do not exceed 50 per cent of the fair market value of the property covered thereby.
>
> (12) In promissory notes amply secured by pledge of any of the bonds, real estate mortgages or securities in which investment is hereinbefore authorized."

and Section 320.02:

> "The proportion of any one trust fund that may be invested by • • • trustee in notes • • • the value of which is dependent upon the same persons • • • shall be subject to limitations as follows:
>
> • • • • • • •

(3) When it exceeds twenty thousand but does not exceed fifty thousand dollars, thirty per cent thereof;"

QUESTIONS PRESENTED

1. Was it proper for the Courts below to deprive the income beneficiaries of an inter vivos trust of their equitable election to disavow an exchange of proper trust assets for an improper reinvestment and to trace those proper trust assets—merely because the improper reinvestment did return an income in excess of that earned by "legal" trust investments in which a reinvestment could have been made (but was not made)?

2. Was it proper for the Courts below to deprive the income beneficiaries of an inter vivos trust of their election to disavow an exchange of trust assets made by a trustee acting at the time in a dual capacity (a) as trustee for the income beneficiaries and (b) as financial agent for the transferee of the trust assets who profited from the exchange—merely because the trustee acted in good faith in effecting the exchange and did not personally make a profit?

STATEMENT OF THE CASE

This is an action for breach of trust. Petitioner, representing the income beneficiaries of an inter vivos trust, seeks the traditional remedy of tracing trust assets which have been wrongfully diverted from the trust into the hands of a transferee who does not claim to be a bona fide purchaser for value without notice. Petitioner seeks to recover from the participants in the violation of trust,

as well as from the transferee, nothing more than the return of trust assets and the profits which any of the participants made as a consequence of the breach of trust. No damages of any kind are asked and none are asserted as such. Both lower courts refused to grant this traditional remedy for the novel reason that no damages to the income beneficiaries were shown (App. 47-8; App. A xii).

The Court of Appeals affirmed a judgment of the District Court, which dismissed the complaint in this action brought against respondent Waukesha National Bank, as trustee, and respondent Bach, as the transferee of the diverted trust assets. Petitioner is administrator of the estate of the surviving income beneficiary.

Petitioner claims that respondent trustee in violation of its trust exchanged proper high income producing trust assets for an improper reinvestment, with which it set aside the particular trust fund here involved. As a consequence, petitioner asserts a right of election to disaffirm the improper reinvestment and to compel restoration of the exchanged assets and their income to the trust. Petitioner elected to trace particular assets diverted into the hands of respondent Bach, who is a gratuitous transferee of the assets with notice of the trust. The District Court denied petitioner's right of election (App. 47-8) and the Court of Appeals did so also, only because "there is no showing of damage" to the income beneficiaries (App. A xii).

Alfred W. Perkins and Sue Garrett Perkins, the now deceased life income beneficiaries of a $50,000 trust fund to be set aside for their benefit, brought this action in

1952. Jurisdiction of the District Court is based on diversity of citizenship. The two Perkins charged breach of trust and sought an accounting for misappropriated trust assets.

Samper A. Perkins, the settlor, created the trust in suit by transfer of a substantial portfolio of assets to respondent trustee, Waukesha National Bank, to be administered in Wisconsin under a trust agreement executed in 1932 (App. A ii; App. 59-66). The trust agreement provided that within five years after the settlor's death a $50,000 trust fund was to be set aside from the assets of the trust estate for the benefit of the life income beneficiaries, Alfred W. Perkins and his wife, or the survivor. The income from this fund was to be paid to them for their respective lives, following which the principal of the fund was to be distributed to the remainderman, Mrs. Isabel Hadcock (App. 59-66). The settlor died on August 15, 1932 (App. A iii).

The Court of Appeals determined that the trust estate transferred to respondent trustee included properties which did not qualify as "legal" trust investments under the statutes of Wisconsin (App. A ii; App. 66-7). However, the trust agreement authorized the trustee to retain any such "non-legal" investments which the settlor himself had placed in trust (App. A ii; App. 60). In this regard, the Wisconsin Supreme Court in *First Wisconsin Trust Company v. Perkins* (1957) 275 Wis. 464, 82 N.W. 2d 331 defined certain duties of the trustee under the trust agreement and held that, although the trustee could retain "non-legal" investments placed in the trust by the settlor, any discretionary reinvestments of trust funds

must comply with the limitations of the Wisconsin statutes governing "legal" trust investments. The Court of Appeals was bound by the decision that, in setting aside the $50,000 fund here involved, respondent trustee was limited to two investment choices—assets transferred to the trust by the settlor or "legal" trust investments authorized by Wisconsin statute (App. A x).

Petitioner charged that in setting aside the $50,000 fund, respondent trustee violated its trust by selecting neither of the two investment choices available to it for funding the trust. The trustee, instead, exchanged assets it then held in trust and with which the $50,000 fund could have been created, for a reinvestment in the personal note of Isabel Hadcock in the sum of $50,000 with interest payable at 5% per year (App. A vii). The District Court found that this personal note of Isabel Hadcock was not an authorized trust investment under the applicable Wisconsin statutes (App. 38).

The Court of Appeals did not decide the issue but held that petitioner was not entitled to the requested relief, in any event, because the 5% note yielded more than the average yield of "legal" trust investments (App. 55) and, hence, the life beneficiaries sustained no loss (App. A xii-xiii). The Court of Appeals reached this conclusion in spite of the fact that at the time of the exchange, and thereafter, the trust assets exchanged for the note earned substantially in excess of 5% per annum (App. 55).

So while Isabel Hadcock in effect was paying out 5% yield to the life income beneficiaries she was actually receiving in excess of that amount. This was accomplished

by the action of the trustee in accepting the personal note of Isabel Hadcock in lieu of setting aside assets of the trust. Petitioner regards this as illegal and improper. Here, the participants in the breach of trust obtained a profit for Isabel Hadcock—the difference between "substantially in excess of 5% income" and only 5%. But, both courts held that the income beneficiaries did not sustain a loss comparable to this profit. If that conduct can be upheld, respondents have found the perfect way to escape all legal consequences for a breach of trust—merely to execute a personal note at the statutory rate of interest.

Petitioner also charged that respondent trustee violated its trust by representing, as a financial agent, the remainderman of the trust, to whom the trust assets were transferred, at the same time that it endeavored to represent the conflicting interests of income beneficiaries in setting aside their $50,000 fund. The Court of Appeals concluded that this dual fiduciary relationship did in fact exist (App. A v-x). However, basing its decision upon a finding of the District Court that the trustee acted in "good faith" in making the foregoing exchange and that the improper reinvestment was to the "advantage" of the income beneficiaries, the Court of Appeals held that the beneficiaries were not entitled to a restoration of the exchanged trust assets (App. A x).

From June 25, 1940 until it resigned in 1955 respondent trustee held in trust the personal note of the remainderman and the note interest was paid to the income beneficiaries (App. 56-7). During this period the annual yield on "legal" trust investments complying

with the Wisconsin statutes did not exceed the 5% earned on the note (App. 55). However, it is stipulated that some of the trust assets exchanged for the note continued to earn in excess of 5%. Many were retained in an investment portfolio managed by respondent bank as financial agent for the remainderman (App. 87-89).

Prior to respondent's resignation, Mrs. Hadcock, the remainderman, died and at the time the complaint in this action was filed, her estate was in probate (App. 56). Respondent Edward G. Bach is the executor of that estate, a trustee under the will of Isabel Hadcock, and the gratuitous transferee with notice of certain assets and income which petitioner seeks to restore to the trust (App. A xv).

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS, IN PERMITTING AND CONDONING THE IMPROPER TRUST INVESTMENT, HAS DECIDED AN IMPORTANT QUESTION OF WISCONSIN LAW IN A MANNER DIRECTLY CONFLICTING WITH A DECISION OF THE WISCONSIN SUPREME COURT CONSTRUING THE SAME TRUST.

Under the rule of *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64 and under U.S. Code, Title 28, Section 1652, the lower federal courts, having jurisdiction because of diversity of citizenship, were bound to follow Wisconsin law applicable to the administration of this trust. The Wisconsin Supreme Court has construed the very trust involved in this suit in *First Wisconsin Trust Company v. Perkins* (1957) 275 Wis. 464, 82 N.W. 2d 331. The Wisconsin Supreme Court there held that under the trust

agreement the trustee was authorized to hold any assets originally transferred to it by the settlor, whether or not those assets conformed to Wisconsin statutes governing trust investments. However, the court further held that the trustee was not empowered to make any discretionary reinvestments of trust assets beyond the limitations of the Wisconsin statutes (*First Wisconsin Trust Company v. Perkins* (1957) 275 Wis. 464, 82 N.W. 2d 331; summarized at App. A x-xi).

In direct violation of its investment powers, respondent trustee funded the $50,000 trust fund with the personal note of the remainderman in exchange for proper trust assets respondent then held in trust. This note was not an asset which the settlor had placed in trust. This note also did not comply with the limitations of the Wisconsin statutes, as found by the District Court (App. 38). This note clearly was an improper reinvestment of trust funds. Respondent did not follow either of the only two courses of investment available to it.

Although recognizing that respondent trustee may have exceeded its limited investment powers (App. A x-xii), the Court of Appeals, nonetheless, permitted and condoned the improper investment by denying to petitioner the relief here requested. This judicial approval of an improper trust investment under the trust agreement is in direct conflict with the decision of the Wisconsin Supreme Court in *First Wisconsin Trust Company v. Perkins* (1957) 275 Wis. 464, 82 N.W. 2d 331.

2. THE COURT OF APPEALS, IN DENYING TO PETITIONER AN OPTION TO DISAFFIRM THE IMPROPER TRUST INVESTMENT AND COMPEL RESTORATION OF TRUST ASSETS EXCHANGED FOR IT, HAS DECIDED AN IMPORTANT QUESTION OF WISCONSIN LAW IN A MANNER CONFLICTING WITH THE APPLICABLE DECISIONS OF THE WISCONSIN SUPREME COURT AND OF THIS COURT.

The decision of the Court of Appeals conflicts with Wisconsin law in two important additional respects.

First, the Wisconsin law does not require, as the Court of Appeals has held (App. A xii), that petitioner first must show damages before he is entitled to a restoration of trust assets exchanged in violation of trust.

While conceding that respondents may have violated the trust by exchanging proper trust assets for a reinvestment unauthorized by Wisconsin statute, the Court of Appeals, nonetheless, denied the wronged income beneficiaries their right to elect to disaffirm the exchange and compel a restoration to the trust of the exchanged trust assets. The *only* reason given by the Court of Appeals for that denial is that there was "no showing of damage" to the income beneficiaries (App. A xii).

This holding squarely conflicts with the law of Wisconsin as announced by this Court in *Oliver v. Piatt* (1845) 3 How. (44 U.S.) 333.[3] Where proper trust assets have been exchanged for improper ones, a beneficiary, as a remedy for the breach of trust, is entitled either to affirm the transaction and accept the improper investment or to

[3]Under the Wisconsin constitution, adopted March 13, 1848, Article 14, Section 13, the rule of *Oliver* is a part of the law of Wisconsin.

disaffirm the exchange and require a restoration of the exchanged assets, insofar as they can be traced into the hands of the trustee or others who are not bona fide purchasers for value. The option is one which belongs exclusively to the beneficiary and neither the trustee nor anyone else can deprive him of it [*Oliver v. Piatt* (1845) 3 How. (44 U.S.) 333, 401]. At page 401 this Court stated the rule as follows:

> "• • • It is a clearly established principle in that [equity] jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the cestui que trust has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser, for a valuable consideration, without notice. And if the trustee has invested the trust property, or its proceeds, in any other property into which it can be distinctly traced, the cestui que trust has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. This right or option of the cestui que trust is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any subsequent re-purchase of the trust property, although in the latter case the cestui que trust may, if he pleases, avail himself of his own right, and take back and hold the trust property upon the original trust; but he is not compellable so to do. • • • The option, in such case, to take the new or the original fund is, therefore, (as has been already suggested,) exclusively given to the cestui que trust, and is given to him for the wisest purposes and upon the soundest

> public policy. It is to aid in the maintenance of right and in the suppression of meditated wrong. • • •"

In *Oliver* the trustee misappropriated trust assets by exchanging them for other property. The misappropriated trust assets were later repurchased by the trustee and returned to the trust. Thus, the beneficiaries there were not damaged for they then had the same assets which were originally held in trust. This Court, nonetheless, held that the beneficiaries were entitled to elect to refuse the returned trust assets and to compel restoration of the other property, instead, to the trust as the trust investment.

In the instant case, in spite of respondent trustee's breach of trust and contrary to the rule of *Oliver*, the Court of Appeals refused to permit the life income beneficiaries to exercise their option of requiring a restoration of the exchanged assets. Instead, the Court of Appeals held that the life beneficiaries must accept the improper trust investment whether they want it or not, solely because the court found they had not been damaged. This is not the law of the *Oliver* case. Petitioner is not seeking damages and his claim has nothing to do with damages.

This Court has held that damages or the lack of damages have no relation to the option announced in *Oliver*. In *United States v. Dunn* (1925) 268 U.S. 121 at page 131 this Court stated:

> "Undoubtedly in an action at law for fraud or deceit, since the action sounds in damage, the plaintiff must prove damage to establish a right to recover.

> • • • But such is not the situation here presented. The grant of the lease by Thomas, the guardian, to Dunn and Gillam with a secret agreement that the guardian should be jointly interested in the lease with Dunn and Gillam, was a fraud upon the ward, rendering the whole transaction voidable at the option of the ward or those legally representing her. *It is not necessary in such a situation in order to establish the right to relief to show that the beneficiary was damaged by the fraudulent conduct of the trustee.* It is sufficient to establish that the fiduciary has exercised his power of disposition for his own benefit without more. (Citations omitted; emphasis added)."

It is therefore settled that the option to affirm or disaffirm the present exchange does not depend upon damages, but is exclusively one for the benefit of the beneficiary and cannot be taken away. This is true even where the trustee itself, as found by the Court of Appeals (App. A xiii), has made no profit from the improper investment.[4]

In a consistent line of authority, set forth in chart form in Appendix B, the Wisconsin Supreme Court has adopted the rule of *Oliver v. Piatt* (1845) 3 How. (44 U.S.) 333 and has held that a beneficiary may require restoration of trust assets exchanged in violation of trust even though no damage to the beneficiary has been sustained [*Will of Gabel* (1954) 267 Wis. 208, 64 N.W. 2d 853; *Old Settlers Club v. Haun* (1944) 245 Wis. 213, 13 N.W. 2d 913; *Ludington v. Patton* (1901) 111 Wis. 208, 86 N.W. 571; *O'Dell and others v. Rogers and others* (1878) 44 Wis. 136; and *Cook v. Berlin Woolen Mills* (1877) 43 Wis. 433]. The

[4]One trustee, Baum, in *Oliver* made no profit from his violations of trust.

election is entirely up to the beneficiary and is not dependent upon whether or not the trust estate has sustained a loss because the option arises solely upon the establishment of a violation of duty owed by the trustee. In *Will of Gabel* (1954) 267 Wis. 208, 64 N.W. 2d 853 the Wisconsin Supreme Court pointed this out at 267 Wis. 211.

> "* * * He [the trustee] is not relieved of the result of such conduct by the fact that he acted in good faith and without loss to the trust * * *"

Similarly, in *Ludington v. Patton* (1901) 111 Wis. 208, 86 N.W. 571 a trustee and heirs of a decedent induced decedent's widow, a life income beneficiary under a testamentary trust established by decedent, to relinquish her dower rights in his estate in exchange for a larger life income and cash sum than that provided in the testamentary trust. She later discovered that she would have received considerably more if she had taken, instead, her dower rights against the will. The Wisconsin Supreme Court held that, although the widow had received more generous sums than provided in the trust, as a remedy for the violations of trust committed by the trustee, the widow was entitled to a restoration of the estate assets which she could have obtained by electing to take her dower interest against the will.

This salutary rule of election has frequently been applied by this Court, and most recently in *Duplate Corp. v. Triplex Co.* (1936) 298 U.S. 448, 458; *Buffum v. Barcelona Co.* (1933) 289 U.S. 227, 236; and *United States v. Dunn* (1925) 268 U.S. 121, 132. The option is as vital today as it has been in the past. [See *General Petroleum Corpo-*

ration v. Doherty (9th Cir. 1941) 117 F. 2d 529, 539; and *Glen Falls Indemnity Co. v. Golden* (D. of D.C. 1957) 148 F. Supp. 41, 43]. The rule is a part of or has been adopted as the common law of almost every state in the Union.[5]

The option exclusively given to the beneficiary "is given to him for the wisest purposes and upon the soundest public policy" [*Oliver v. Piatt* (1845) 3 How. (44 U.S.) 333, 401]. The availability of the option is of great public interest and essential to enforce the absolute fidelity with which trustees must be charged in handling their beneficiary's affairs. As stated by the Wisconsin Supreme Court in *Estate of Allis* (1926) 191 Wis. 23, 209 N.W. 945, at 191 Wis. 29:

> "• • • The performance of the duties of a trustee require the exercise of a high degree of fidelity, vigilance, and ability. Especially is this true when the trustee is a company organized for the purpose of caring for trust estates, which holds itself out as possessing a special skill in the performance of the duties of a trustee, and which makes a charge for its services which adequately compensates it for a high degree of fidelity and ability in the administration of a trust estate.
>
> "Wisconsin early adopted the rule that trustees must exercise more than ordinary diligence and vigilance in the management of a trust estate. *Hutchinson v. Lord*, 1 Wis. 286, 309. Good faith alone in making an investment will not protect a trustee. *Simmons v. Oliver*, 74 Wis. 633, 636, 43 N.W. 561. A trustee must also exercise diligence, prudence, and absolute fidelity."

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[5]*Shepard's United States Citations* alone lists cases in over forty states in which the rule has been applied.

Only by permitting a wronged beneficiary at his own option to elect to affirm or disaffirm wrongful acts of a trustee, can this "absolute fidelity" be assured, particularly in an instance where no relief by way of damages can be shown.

The Court of Appeals in denying to petitioner this option to compel restoration of trust assets has cited Wisconsin damage cases (App. A xii). None states the Wisconsin law applicable to an exchange of proper trust assets for an improper one as presented in the case at bar. In each of the cited cases the beneficiary elected to pursue the remedy of damages only, for the violation of trust. In each case, as distinguished from the case at bar, the beneficiary did not or could not elect the alternate remedy available for restoration of transferred assets. Both *Guardianship of Farness* (1937) 225 Wis. 383, 273 N.W. 522 and *U. S. Fidelity & G. Co. v. Pullen* (1939) 230 Wis. 137, 283 N.W. 462 were actions for damages where the fiduciaries continued to hold improper trust investments which they were under an obligation to convert into "legal" investments. *Guardianship of Uggen* (1937) 224 Wis. 24, 271 N.W. 326 was an action for damages where the guardian invested a cash sum in improper securities. In none of those cases did the trustee originally hold proper investments which were later exchanged for improper ones as presented by the record in this suit. As a consequence, damages for the violations of trust was the only possible remedy there available. There were no proper assets held in trust which could have been restored.

The decision of the Court of Appeals in grafting a requirement for proof of damages upon the foregoing rule

of election is in direct conflict with the Wisconsin authorities enumerated in Appendix B. The decisions of the Wisconsin Supreme Court do not require a showing of damages as a condition precedent to granting the equitable relief here requested by petitioner.

Second, Wisconsin law provides that the mere occupancy by a trustee of a dual fiduciary capacity in any transfer of trust assets is a violation of trust, which may be justified only by proof that the beneficiaries of the trust received the "full equivalent" of everything with which they parted in the transfer. The Court of Appeals has erroneously applied that rule to the facts of this case in a manner conflicting with the decisions of the Wisconsin Supreme Court.

The conflict is crystal clear. The well-established rule of Wisconsin law is stated succinctly in *Ludington v. Patton* (1901), 111 Wis. 208, 86 N.W. 571 at 111 Wis. 239:

> "No rule is better established than that, if a trustee or a person standing in relations of trust and confidence to another deal with the cestui que trust or such other in respect to the subject of such trust, for his own benefit or that of others whom he represents, serving two persons at the same time, in form, when in contemplation of law he can serve but one loyally, *the transaction cannot be upheld if called in question by the cestui que trust unless the trustee is able to prove to the satisfaction of the court by clear and satisfactory evidence,* that the two were at arm's length in the transaction, that no confidence was reposed in him by the beneficiary, *that the bargain was profitable to the beneficiary,* and that he was fully informed in regard to the value of the property and the nature of his interest in it. (cita-

tions omitted) The policy of the law is to regard all transactions of a contract nature, between a trustee and his cestui que trust, whereby the former obtains the interest of the latter, or some part thereof, in the subject of the trust, as presumptively fraudulent and void at the election of the latter. *If such a transaction be permitted to stand it is upon condition that the trustee satisfies the court, fully and completely, that the cestui que trust received a full equivalent for that which he parted with,* and that the transaction was to his advantage rather than to his disadvantage. The burden of proof in such a case rests upon the trustee to clearly free himself from the imputation of fraud arising from the facts, and the same is true where a person deals to his own advantage with a person with whom he sustains relations of trust and confidence. * * *'' (Emphasis added).

Thus, not only must a trustee establish that the transaction was to the "advantage ' of the wronged beneficiary as noted by the Court of Appeals (App. A x), but also, the recreant trustee must also establish that the beneficiary "received a full equivalent for that which he parted with * * *." What the life tenants "parted with" here was income from assets earning "substantially in excess of 5% income" (App. 55) and what they "received" was 5% annual income on $50,000. The latter by simple arithmetic was not the full equivalent of what the life beneficiaries "parted with". As a consequence, the exchange in suit did not meet any of the requirements of the rule announced in the *Ludington* case.

The Wisconsin Supreme Court has applied the same standard in *Shaw v. Crandon State Bank* (1911), 145 Wis. 639, 129 N.W. 794; *Hutson v. Jenson* (1901), 110 Wis. 26,

85 N.W. 689; *In re Filardo* (1936) 221 Wis. 589, 267 N.W. 312, and *Cook v. Berlin Woolen Mills* (1877), 43 Wis. 433.

Petitioner therefore submits that, not only is the decision of the Court of Appeals in direct conflict with the controlling Wisconsin law announced by this Court in *Oliver v. Piatt* (1845) 3 How. (44 U.S.) 333, but also, the decision in two respects is in conflict with the controlling Wisconsin law as announced by the Wisconsin Supreme Court.

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3. THE DECISION OF THE COURT OF APPEALS, IN DENYING TO PETITIONER THE RIGHT TO TRACE DIVERTED TRUST ASSETS, HAS SO FAR DEPARTED FROM THE FUNDAMENTAL RULES OF EQUITY JURISPRUDENCE AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Counsel for petitioner is unable to locate any legal authority where a wronged beneficiary seeking it, has been denied his remedy to trace wrongfully diverted trust assets. And counsel for respondents, the District Court and the Court of Appeals have not cited any such authority. There is no precedent whatsoever for the decision of the Court of Appeals.

To the contrary, the courts have jealously protected the right of beneficiaries to trace trust assets diverted in violation of trust into the hands of the disloyal trustee or transferees who are not bona fide purchasers for value. The decision of the Court of Appeals is in conflict with the cases cited in the previous section of this petition establishing the right of the wronged beneficiary to compel the restoration to the trust of assets traced in specie. The decision also is in conflict with the following de-

cisions of this Court holding all profits and other property into which the diverted assets have been converted also may be traced even though there has been no loss to the trust.

Michoud v. Girod (1846) 4 How. (45 U.S.) 503;[6]
Magruder v. Drury (1914) 235 U.S. 106;
Jackson v. Smith (1921) 254 U.S. 586; and
United States v. Dunn (1925) 268 U.S. 121.

Petitioner respectfully submits that this Court should not permit any erosion of this important rule which has become a fundamental touchstone in equity jurisprudence.

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for the writ of certiorari should be granted. This Court, in *West v. A. T. & T. Co.* (1940) 311 U.S. 223, said, page 237:

> "* * * State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all available data what the state law is and to apply it rather than to prescribe a different rule. * * *."

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CLIFFORD C. KASDORF,
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[6]Under Constitution of Wisconsin, Article 14, sec. 13, adopted March 13, 1848, this is Wisconsin law also.

(Appendices A and B Follow)